Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-1777.

BOBBY JOE CRAIG,

Petitioner,

v.

SUN OIL COMPANY OF PENNSYLVANIA

and

WILLIAM R. CLAIBORNE,

Respondents.

BRIEF OF SUN OIL COMPANY OF PENNSYLVANIA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

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OCTOBER TERM, 1975.

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No. A-869.

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BOBBY JOE CRAIG,

Petitioner,

v.

SUN OIL COMPANY OF PENNSYLVANIA

AND

WILLIAM R. CLAIBORNE,

Respondents.

—

BRIEF OF SUN OIL COMPANY OF PENNSYLVANIA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

INTRODUCTION.

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." Supreme Court Rule 19(1). The instant Petition for a writ of certiorari goes to bizarre extremes in attempting to present an important issue for this Court's review. In fact, it is difficult even to discern that the Petition relates to this case. The Petitioner simply ignores his case and attempts to create a new one. However, by reading the opinions of

the district court and the United States Court of Appeals for the Tenth Circuit, it will become apparent that this is an antitrust case (primarily founded upon Sherman Act allegations with additional allegations under the Robinson-Patman Act) which was carefully decided on motions for summary judgment on narrow legal issues and, with regard to some claims, on the basis that there was no genuine issue as to any material fact. In all instances, compliance was had with the procedural requisites of Rule 56 of the Federal Rules of Civil Procedure. In his attempts to avoid the decisions below and to create an issue meriting certiorari review, the Petitioner has grasped at some wording in the Tenth Circuit decision not even pertaining to a direct holding in this case and has attempted to fashion from this language a novel and complicated argument bringing into play the Seventh Amendment to the United States Constition. This attempt has also involved the Petitioner in a gross misstatement of the facts of the case.

COUNTER STATEMENT OF CASE.

In May, 1969, the Petitioner (hereinafter "plaintiff") purchased a tire business located at 3903 South Harvard, Tulsa, Oklahoma, from defendant William R. Claiborne ("Claiborne") (amended complaint, paragraph 3).[1] A copy of the purchase agreement is attached to the amended complaint as Exhibit A and provides in pertinent part as follows:

> The Seller hereby agrees that for a period of five years to refrain from the use of his name in the retailing of tires in an area bounded by 21st St. on the north, the river on the west, 71st St. on the south, and Mingo Rd. on the east in the City of Tulsa, Oklahoma.

For some time prior to this purchase, Claiborne, who operated out of several locations in the Tulsa area, had had a Firestone TBA[2] distributorship with respondent Sun Oil Company of Pennsylvania (hereinafter "Sun"). In connection with this purchase, Sun agreed to grant plaintiff a Firestone TBA distributorship, to extend plaintiff a line of credit and to finance the plaintiff's purchase of equipment and inventory from Claiborne. Sun refused to finance the plaintiff's purchase of "goodwill" from Claiborne. Since Claiborne had previously financed the inventory and equipment at his 3903 South Harvard location with Sun, the new financing included the cancellation of Claiborne's notes covering this inventory and equipment and the signing of new notes by plaintiff. Part of the cancellation of Claiborne's indebtedness to Sun was accomplished by

1. References are not to an appendix or to pages of the record on appeal since, under the local rules of the United States Court of Appeals for the Tenth Circuit, no appendix was required, and counsel for Sun were never furnished either a copy of the record on appeal or the pagination (if there was any) of such record.

2. Tires, batteries and accessories.

plaintiff paying part of the purchase price directly to Sun. (See paragraph 7 of Sun's answer.)

Shortly after plaintiff went into business at the South Harvard location, Claiborne opened a tire warehouse from which he continued in the tire business (amended complaint, paragraph 5). However, Claiborne did not retail tires from this new location. The operation was one hundred percent wholesale, at least to the knowledge of Sun (Brewer deposition, first day, page 26). For reasons which were very much in dispute in the litigation, the plaintiff was unsuccessful in his operation of the tire business, and ceased doing business in February 1970 (amended complaint, paragraph 12), although the plaintiff himself ceased working at the store in October 1969 (deposition of plaintiff, first day, page 111). The plaintiff thereafter failed to pay on its promissory notes to Sun, and it was necessary for Sun to initiate legal proceedings against the plaintiff in state court. (See amended complaint, paragraph 12.)

The plaintiff filed his amended complaint against Sun and Claiborne on May 21, 1973. The complaint primarily attempted to state a conspiracy under section 1 of the Sherman Antitrust Act, 15 U. S. C. A. § 1 (1973). The plaintiff alleged that Claiborne, in selling him the South Harvard location, had represented to him that he was "getting entirely out of the tire business," that Sun knew this and that Claiborne, "with the assistance of Sun Oil Company, and pursuant to a common design of both," began selling tires at the new location and recaptured the dealer and fleet business that he had previously serviced from the South Harvard location (amended complaint, paragraph 5). The crux of the amended complaint appeared in paragraph 8:

> That Sun Oil Company and Claiborne remained silent about their secret plan for Claiborne to open the new facility under the old distributorship of Claiborne when issuing Craig the new distributorship to operate the old facility and induced Craig into believing that he was substituted for Claiborne as distributor rather than being made only an additional distributor . . . .

Plaintiff went on to allege that Sun "favored Claiborne over Craig to insure the success of the new facility to the exclusion of Craig from the market and destroyed his business . . . ." (amended complaint, paragraph 9) Plaintiff then alleged that Sun discriminated in favor of Claiborne by giving him more favorable prices, credit terms, advice and cash rebates. (amended complaint, paragraphs 10 and 11) Asserted as a legal basis for these allegations of discrimination were the Robinson-Patman Act, 15 U. S. C. A. § 13 (1973), and a comparable Oklahoma antitrust statute.

After discovery in the case had been substantially completed, both defendants moved for summary judgment. The district court granted these motions and entered judgment in favor of defendants, and the United States Court of Appeals for the Tenth Circuit affirmed. (Appendices B and A to Petition for Writ of Certiorari)

ARGUMENT.

The primary holdings of the two courts which have considered this case are barely mentioned in the Petition. The major thrust of the complaint was a Sherman Act conspiracy, and both the district court and the Tenth Circuit held that the facts alleged did not state a cause of action under section 1 of the Sherman Act since, under well established law in the Tenth Circuit [3] and in other circuits,[4] a plaintiff must allege a decrease in competition or the number of competitors, and here the conspiracy alleged was to put another competitor into the market. The Petition gives but passing mention to this holding (pages 21-22) and does not seriously argue that this holding merits certiorari review under Supreme Court Rule 19.

Secondly, the Tenth Circuit and the district court held that, assuming as true the facts alleged as to credit discrimination, they could not as a matter of law be the basis for a claim under sections 2(a) or (e) of the Robinson-Patman Act.[5] *See Secatore's, Inc. v. Esso Standard Oil Co.*, 171 F. Supp. 665, 668 (D. Mass. 1959); *Skinner v. United States Steel Corp.*, 233 F. 2d 762, 765 (5th Cir. 1956); *Cook v. Ralston Purina Co.*, 366 F. Supp. 999, 1011 (M. D. Ga. 1973). As with the Tenth Circuit's ruling on the Sherman Act claim, the Petition simply mentions this

3. *Fedderson Motors v. Ward*, 180 F. 2d 519 (10th Cir. 1950).

4. *Ace Beer Distrib. v. Kohn, Inc.*, 318 F. 2d 293 (6th Cir.), *cert. denied*, 375 U. S. 922 (1963); *Joseph E. Seagram and Sons v. Hawaiian Oke and Liquors Ltd.*, 416 F. 2d 71 (9th Cir. 1969), *cert. denied*, 396 U. S. 1062 (1970); *Parmelee Transp. Co. v. Keishin*, 186 F. Supp. 533 (N. D. Ill. 1960), *aff'd*, 292 F. 2d 794 (7th Cir. 1961), *cert. denied*, 368 U. S. 944 (1961).

5. The Tenth Circuit qualified its Opinion as follows: "We do not say that there could not be a discrimination in credit of such magnitude or nature as to constitute a violation, but no such extreme violation was alleged here by any means." (Page A-7 of Petition For Writ of Certiorari).

ruling and makes no argument regarding the same (page 22).

Thirdly, the Tenth Circuit and the district court held that the undisputed evidence, consisting of a number of depositions, including that of the plaintiff, and of many documents produced through discovery, demonstrated that there was no factual basis for a claim of discrimination in price between the plaintiff and Claiborne under section 2(a) of the Robinson-Patman Act. Counsel for Sun can find no reference to this holding in the Petition, and apparently the plaintiff does not seek review of this ruling.

Finally, the Tenth Circuit and the district court held that it appeared from the depositions and documents (offered by plaintiff and supported by affidavit) that there was no genuine issue as to any material fact on the issue of whether Sun offered "any services . . . connected with the processing, handling, sale, or offering for sale" of TBA to Claiborne which it did not offer to plaintiff "on proportionally equal terms." Section 2(e) of Robinson-Patman Act, 15 U. S. C. A. § 13(e) (1973). The district court held, and the Tenth Circuit affirmed, that, when Sun offered an affirmative showing that there was no such discrimination,[6] the plaintiff failed to "set forth specific facts showing that there is a genuine issue for trial." Federal Rule of Civil Procedure 56(e).

This holding as to discrimination in services seems to be the second of two issues which, according to the Petition, merit review by this Court. (See pages 10-21 of the Petition.) The plaintiff asserts that both the district court and the Tenth Circuit erred in finding that he had failed, under Rule 56(e), to come forward with any facts demonstrating a genuine issue for trial and seeks from this Court

6. This showing consisted of the submission of the depositions of plaintiff, plaintiff's brother (who managed plaintiff's business) and a Sun employee on questioning by plaintiff's counsel.

the opportunity to attempt, for the third time, to construct an inferential chain from which a relevant fact might be gleaned.

It would not be proper in this Brief for Sun to set forth in detail the misleading nature in which the plaintiff sets forth the evidence cited in his Petition. The proper question on this Petition is as to whether the question presented is so important, in light of the considerations set forth in Supreme Court Rule 19, that this Court should undertake to scrutinize in detail the evidence presented to the district court and reviewed again by the Tenth Circuit. That such a factual question does not merit the review of this Court is patently clear. Nevertheless, Sun does consider it important to lay to rest one particular citation of the plaintiff, raised for the first time in this Petition.

After citing the testimony of Mr. Davis, a Sun employee, to the effect that the plaintiff asked for and received more service than Mr. Claiborne, the plaintiff in the Petition goes on to state that: "This is directly contradicted by the deposition testimony of Bobby Joe Craig." (page 11). The testimony purportedly supporting this assertion is found at the top of page 12 of the Petition. The first two questions and answers are lines 19-24, page 89, testimony of plaintiff on April 21, 1970, and inquire whether the plaintiff asked representatives of Sun to come out and give him help, and the plaintiff responded that he asked Mr. Davis to come out. The next question in the deposition was not the next question quoted at page 12 of the Petition. The quoted question, regarding Mr. Davis fulfilling his obligations, is found at page 91, line 22, and does not pertain to Mr. Davis fulfilling an obligation to come out and give the plaintiff help. In order to understand what this testimony did refer to, it is necessary to read the testimony between pages 89 and 91, which the plaintiff conveniently left out without any indication of its omission.

After testifying at page 89 that he sometimes asked Mr. Davis for help, the plaintiff next testified that what he asked Mr. Davis to do was to "straighten out some cost structure on some pricing," and that Mr. Davis came out but did not straighten it out, but Mr. Fehrenbacher, another Sun employee straightened it out in six weeks or two months (page 90, lines 1-18). The fulfillment of obligation testimony on page 91 referred to Mr. Davis straightening out this pricing. After testifying that Mr. Davis "never did fulfill it," he was asked:

> Q. What was his obligation to you?
>
> A. Obligation to me was to get it straightened out.
>
> Q. What now, what?
>
> A. The price on tires, my cost.
>
> Q. All right. Does this discrepancy still exist?
>
> A. No, it's not now. They finally took care of it.
>
> Q. Well, then, it was straightened out to your satisfaction?
>
> A. Yes, sir, after six weeks or two months.

Page 91, line 25 to page 92, line 8.

It is clear from the above that the evidence which the plaintiff cites simply does not stand for the proposition for which it is cited. However, more importantly, Sun would make the point that this Court should not exercise its certiorari jurisdiction to hear this matter for the third time.

Sun has set forth above the holdings of the Tenth Circuit and the position of the Petition with regard to each. However, the first question raised by the Petition, and the one argued with the greatest vigor, has not yet been discussed because it does not even relate to an issue truly in this case and is raised for the first time in this Petition. The plaintiff, at page 3 of his Petition, focuses on the statement by the Tenth Circuit that:

> The allegations of the complaint relating to discrimination in the furnishing of facilities are conclusionary only. The record contains nothing which could relate to such an allegation.

and seeks to manufacture an issue somewhat as follows: Since this issue was raised by the amended complaint, it is an issue in the case, and to deprive plaintiff of his claim in this regard denies him his Seventh Amendment right to a jury trial.

Unfortunately, the plaintiff has not seen fit to include the amended complaint in his Petition. Although the amended complaint made specific allegations as to discrimination in services between plaintiff and Claiborne (see paragraph 11), there is only one conclusory mention of discrimination in facilities in this pleading: ". . . proximate result of the concerted acts of discrimination in price, credit, cash rebates, services and facilities of Defendants . . . ." (paragraph 13). This is why the Tenth Circuit referred to the conclusory nature of this allegation. However, Sun's motion was not based upon the conclusory nature of this pleading but rather upon the clear deposition testimony of the plaintiff himself and of his brother that there was no discrimination in services or facilities. Faced with this testimony, it was plaintiff's obligation under Rule 56(e) "to set forth specific facts showing that there is a genuine issue for trial." Not only did the plaintiff fail to come forward with any evidence of discrimination in facilities, but also he has not ever suggested, even in his Petition, that he has anything at all to present if a trial on this issue were to be held.[7] As this Court stated

7. In this regard, it should be noted that the motions for summary judgment were not filed at the beginning of the discovery period but rather after the case had been called for a final pretrial conference and after discovery had been substantially completed and the case was ready to proceed to trial.

in *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U. S. 253, 289-90 (1968):

> To the extent that petitioner's burden of proof argument can be interpreted to suggest that Rule 56(e) should, in effect, be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations, we decline to accept it. While we recognize the importance of preserving litigant's rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint.

CONCLUSION.

It is clear from the strained nature of plaintiff's attempts to create an important issue that no such issue exists which would merit this Court's review. For this reason and for the further reason that the decision of the district court as affirmed by the Tenth Circuit was clearly correct, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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